

JS 44 (Rev. 10/20)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of process as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

Cesar and Veronica Cucul (h/w)
145 Browning Avenue, Ewing, NJ 08638

(b) County of Residence of First Listed Plaintiff Mercer, NJ
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

Joel R. Rosenberg, Esq., STARK 7 STARK
401 Route 73 North, Suite 130, Marlton, NJ 08638

DEFENDANTS

Gabriel Brothers, Inc. and GABE'S
55 Scott Avenue, Morgantown, WV 26508

County of Residence of First Listed Defendant Monongalia, WV
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

Edward J. Tuite/Nicholas Bowers, Marshall Dennehey
2000 Market Street, Suite 2300, Philadelphia, PA 19103

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☐ 2 U.S. Government Defendant
- ☐ 3 Federal Question (U.S. Government Not a Party)
- ☒ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | PTF | DEF | | PTF | DEF |
|---|---------------------------------------|----------------------------|---|----------------------------|---------------------------------------|
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input checked="" type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input checked="" type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Click here for: Nature of Suit Code Descriptions.

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input checked="" type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	PERSONAL INJURY <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 835 Patent - Abbreviated New Drug Application <input type="checkbox"/> 840 Trademark <input type="checkbox"/> 880 Defend Trade Secrets Act of 2016 SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 376 Qui Tam (31 USC 3729(a)) <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit (15 USC 1681 or 1692) <input type="checkbox"/> 485 Telephone Consumer Protection Act <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	PRISONER PETITIONS Habeas Corpus: <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty Other: <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement			

V. ORIGIN (Place an "X" in One Box Only)

- ☐ 1 Original Proceeding
- ☒ 2 Removed from State Court
- ☐ 3 Remanded from Appellate Court
- ☐ 4 Reinstated or Reopened
- ☐ 5 Transferred from Another District (specify)
- ☐ 6 Multidistrict Litigation - Transfer
- ☐ 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

Plaintiffs are Citizens of New Jersey; Defendants are incorporated and have principal place of business in West Virginia (Diversity)

Brief description of cause:

Plaintiff allegedly had a rack fall on his (premises liability)

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

DEMAND \$

in excess of \$75,000

CHECK YES only if demanded in complaint:

JURY DEMAND: ☒ Yes ☐ No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE
January 6, 2022

SIGNATURE OF ATTORNEY OF RECORD
/s/ Nicholas D. Bowers

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

CASE MANAGEMENT TRACK DESIGNATION FORM

Cesar and Veronica Cucul (h/w)	:	CIVIL ACTION
	:	
v.	:	
	:	
Gabriel Brothers, Inc.; GABE's, John Does, et. al.	:	NO.

In accordance with the Civil Justice Expense and Delay Reduction Plan of this court, counsel for plaintiff shall complete a Case Management Track Designation Form in all civil cases at the time of filing the complaint and serve a copy on all defendants. (See § 1:03 of the plan set forth on the reverse side of this form.) In the event that a defendant does not agree with the plaintiff regarding said designation, that defendant shall, with its first appearance, submit to the clerk of court and serve on the plaintiff and all other parties, a Case Management Track Designation Form specifying the track to which that defendant believes the case should be assigned.

SELECT ONE OF THE FOLLOWING CASE MANAGEMENT TRACKS:

- (a) Habeas Corpus – Cases brought under 28 U.S.C. § 2241 through § 2255. ()
- (b) Social Security – Cases requesting review of a decision of the Secretary of Health and Human Services denying plaintiff Social Security Benefits. ()
- (c) Arbitration – Cases required to be designated for arbitration under Local Civil Rule 53.2. ()
- (d) Asbestos – Cases involving claims for personal injury or property damage from exposure to asbestos. ()
- (e) Special Management – Cases that do not fall into tracks (a) through (d) that are commonly referred to as complex and that need special or intense management by the court. (See reverse side of this form for a detailed explanation of special management cases.) ()
- (f) Standard Management – Cases that do not fall into any one of the other tracks. (✓)

<u>01/062022</u>	<u>/s/ Nicholas D. Bowers</u>	<u>Gabriel Brothers, Inc. and GABE'S</u>
Date	Attorney-at-law	Attorney for
<u>215-575-2742</u>	<u>215-575-0856</u>	<u>ndbowers@mdwcg.com</u>
Telephone	FAX Number	E-Mail Address

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

CASE MANAGEMENT TRACK DESIGNATION FORM

Cesar and Veronica Cucul (h/w)	:	CIVIL ACTION
	:	
v.	:	
	:	
Gabriel Brothers, Inc.; GABE's, John Does, et. al.	:	NO.

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01/062022	/s/ Nicholas D. Bowers	Gabriel Brothers, Inc. and GABE'S
Date	Attorney-at-law	Attorney for
215-575-2742	215-575-0856	ndbowers@mdwecg.com
Telephone	FAX Number	E-Mail Address

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DESIGNATION FORM

(to be used by counsel or pro se plaintiff to indicate the category of the case for the purpose of assignment to the appropriate calendar)

Address of Plaintiff: 145 Browning Avenue, Ewing, NJ 08638

Address of Defendant: 55 Scott Avenue, Morgantown, WV 26508

Place of Accident, Incident or Transaction: 495 S. Oxford Road, Suite A, Fairless Hills, PA 19030

RELATED CASE, IF ANY:

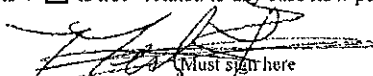
Case Number: _____ Judge: _____ Date Terminated: _____

Civil cases are deemed related when *Yes* is answered to any of the following questions:

- | | | |
|--|------------------------------|--|
| 1. Is this case related to property included in an earlier numbered suit pending or within one year previously terminated action in this court? | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> |
| 2. Does this case involve the same issue of fact or grow out of the same transaction as a prior suit pending or within one year previously terminated action in this court? | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> |
| 3. Does this case involve the validity or infringement of a patent already in suit or any earlier numbered case pending or within one year previously terminated action of this court? | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> |
| 4. Is this case a second or successive habeas corpus, social security appeal, or pro se civil rights case filed by the same individual? | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> |

I certify that, to my knowledge, the within case ☐ is / ☒ is not related to any case now pending or within one year previously terminated action in this court except as noted above.

DATE: 01/06/2022



Attorney-at-Law / Pro Se Plaintiff

315198

Attorney I.D. # (if applicable)

CIVIL: (Place a ✓ in one category only)

A. Federal Question Cases:

- ☐ 1. Indemnity Contract, Marine Contract, and All Other Contracts
- ☐ 2. FELA
- ☐ 3. Jones Act-Personal Injury
- ☐ 4. Antitrust
- ☐ 5. Patent
- ☐ 6. Labor-Management Relations
- ☐ 7. Civil Rights
- ☐ 8. Habeas Corpus
- ☐ 9. Securities Act(s) Cases
- ☐ 10. Social Security Review Cases
- ☐ 11. All other Federal Question Cases
(Please specify): _____

B. Diversity Jurisdiction Cases:

- ☐ 1. Insurance Contract and Other Contracts
- ☐ 2. Airplane Personal Injury
- ☐ 3. Assault, Defamation
- ☐ 4. Marine Personal Injury
- ☐ 5. Motor Vehicle Personal Injury
- ☒ 6. Other Personal Injury (Please specify): Premises
- ☐ 7. Products Liability
- ☐ 8. Products Liability - Asbestos
- ☐ 9. All other Diversity Cases
(Please specify): _____

ARBITRATION CERTIFICATION

(The effect of this certification is to remove the case from eligibility for arbitration.)

I, _____, counsel of record or pro se plaintiff, do hereby certify:

☐ Pursuant to Local Civil Rule 53.2, § 3(c) (2), that to the best of my knowledge and belief, the damages recoverable in this civil action case exceed the sum of \$150,000.00 exclusive of interest and costs:

☐ Relief other than monetary damages is sought.

DATE: _____ Sign here if applicable

Attorney-at-Law / Pro Se Plaintiff

Attorney I.D. # (if applicable)

NOTE: A trial de novo will be a trial by jury only if there has been compliance with F.R.C.P. 38.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

CESAR CUCUL; and,	:	CIVIL ACTION
VERONICA CUCUL	:	
	:	
Plaintiffs	:	
	:	
v.	:	NO.
	:	
GABRIEL BROTHERS, INC.; and,	:	
	:	
GABE'S; and,	:	
	:	
JOHN DOES 1-10 (fictitious property	:	
Owner); and,	:	
	:	
JOHN DOES 11-21 (fictitious property	:	
Manager)	:	
	:	
Defendants	:	

CESAR CUCUL; and,	:	COURT OF COMMON PLEAS
VERONICA CUCUL	:	PHILADELPHIA COUNTY
	:	
Plaintiffs	:	
	:	
v.	:	NOVEMBER TERM, 2021
	:	NO. 01069
	:	
GABRIEL BROTHERS, INC.; and,	:	
	:	
GABE'S; and,	:	
	:	
JOHN DOES 1-10 (fictitious property	:	
Owner); and,	:	
	:	
JOHN DOES 11-21 (fictitious property	:	
Manager)	:	
	:	
Defendants	:	

NOTICE OF REMOVAL

To: Joel Rosenberg, Esquire
STARK & STARK

Prothonotary
Court of Common Pleas

401 Route 73 North, Suite 130
Marlton, NJ 08053
(*counsel for Plaintiff*)

Philadelphia County
City Hall
Philadelphia, PA 19107

PLEASE TAKE NOTICE that the Defendants, Gabriel Brothers, Inc. and GABE'S, in a lawsuit styled "*Cesar Cucul and Veronica Cucul v. Gabriel Brothers, Inc., GABE'S, John Does 1-10 and John Does 11-21*"), November Term 2021, No. 01069, in the Court of Common Pleas of Philadelphia County, Pennsylvania, filed a Notice of Removal of said action to the United States District Court for the Eastern District of Pennsylvania on January 6, 2022.

MARSHALL DENNEHEY WARNER
COLEMAN & GOGGIN

/s/ Nicholas D. Bowers

BY:

EDWARD J. TUIITE
NICHOLAS D. BOWERS
Attorneys for Defendants,
Gabriel Brothers, Inc. and "GABE'S"

DATED: 1/6/22

CERTIFICATE OF SERVICE

I, NICHOLAS D. BOWERS, counsel for Defendants, Gabriel Brothers, Inc. and “GABE’S,” hereby certify that a true and correct copy of the foregoing Notice of Removal was served electronically and via First Class Mail upon the following counsel:

Joel Rosenberg, Esquire
STARK & STARK
401 Route 73 North, Suite 130
Marlton, NJ 08053

MARSHALL DENNEHEY WARNER
COLEMAN & GOGGIN

/s/ Nicholas D. Bowers

BY:

NICHOLAS D. BOWERS

1/6/22

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

CESAR CUCUL; and,	:	
VERONICA CUCUL	:	CIVIL ACTION
	:	
Plaintiffs	:	
	:	NO.
v.	:	
	:	
GABRIEL BROTHERS, INC.; and,	:	
	:	
GABE'S; and,	:	
	:	
JOHN DOES 1-10 (fictitious property	:	
Owner); and,	:	
	:	
JOHN DOES 11-21 (fictitious property	:	
Manager)	:	
	:	
Defendants	:	

PETITION FOR REMOVAL

**TO: CLERK OF COURT OF THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

Pursuant to 28 U.S.C. § 1441(b), Removal based on diversity of citizenship, Defendants Gabriel Brothers, Inc. and "GABE'S" (hereinafter collectively "Gabriel Brothers"), files this Notice of Removal from The Court of Common Pleas of Philadelphia, PA, to the United States District Court for the Eastern District of Pennsylvania, averring as follows:

1. On or about November 19, 2021, Plaintiffs, Cesar Cucul and Veronica Cucul, filed a Complaint against Defendants, Gabriel Brothers, Inc. and "GABE'S"¹ as well as John Does 1-10 and 11-21 in the Court of Common Pleas of Philadelphia County requesting damages in an amount

¹ "GABE'S" is not a proper jurial entity, but rather is a d/b/a or trade name for Gabriel Brothers, Inc.

greater than \$50,000. A true and correct copy of Plaintiffs' Complaint, Philadelphia Court of Common Pleas November Term, 2021, No. 01069, , is attached hereto as Exhibit "A."

2. Plaintiffs allege in their Complaint that they are residents of the State of New Jersey. See Exhibit "A" at ¶¶ 1-2.

3. Plaintiffs allege in their Complaint that the incident giving rise to this litigation involved the alleged collapse of a clothing rack on Plaintiff, Cesar Cucul. See Exhibit "A" at ¶¶ 19-20.

4. Plaintiffs further allege that the subject alleged incident occurred at a Gabriel Brothers store located at 496 S. Oxford Valley Road, Suite A, Fairless Hills, PA 19030, which is in Buck County, PA. See Exhibit "A" at ¶ 18.

5. Defendants, Gabriel Brothers, Inc. and "GABE'S," were served with the Complaint on December 10, 2021 at Gabriel Brothers' principal place of business and corporate headquarters, located in West Virginia at 55 Scott Avenue, Morgantown, WV 26508. See Affidavit of Service, attached hereto as Exhibit "B."

6. On December 29, 2021, Gabriel Brothers filed Preliminary Objections to Plaintiffs' Complaint, challenging venue among other issues. Gabriel Brothers' Preliminary Objections are attached hereto as Exhibit "C."

7. Attached as an Exhibit to the Preliminary Objections is the Affidavit of Ryan N. Armstrong, Esq., Corporate Counsel for Risk & Liability at Gabriel Brothers, Inc. d/b/a GABE'S. The Affidavit of Ryan N. Armstrong is attached hereto as Exhibit "D"

8. The Affidavit of Mr. Armstrong contains the following averments which are relevant for purposes of this Petition for Removal:

Gabriel Brothers, Inc. d/b/a GABE'S is a privately held retailer headquartered in Morgantown, West Virginia.

"GABE'S" is a fictitious name and d/b/a for the West Virginia business entity, Gabriel Brothers, Inc.

GABE'S, a fictitious name, is not a business entity of any form nor a proper jural entity.

Gabriel Brothers, Inc. d/b/a GABE'S principal place of business is located at 55 Scott Avenue, Morgantown, WV 26508.

See Exhibit "D," Affidavit of Ryan N. Armstrong.

9. As set forth above, "GABE'S" is not a proper jural entity but rather is a fictitious name and d/b/a for Defendant, Gabriel Brothers, Inc. Gabriel Brothers, Inc. is a West Virginia corporation with its corporate headquarters and principal place of business located in West Virginia. See Exhibit "D," Affidavit of Ryan M. Armstrong. See also Exhibit "B," Affidavit of Service reflective of service upon Gabriel Brothers in Morgantown, West Virginia.

10. On or December 27, 2021, counsel for Gabriel Brothers contacted counsel for Plaintiff and requested that counsel stipulate that the amount in controversy in this case is less than \$75,000. See correspondence dated to December 27, 2021 and proposed stipulation attached hereto as Exhibit "E."

11. Counsel for Plaintiff did not respond to the request to stipulate to limit damages.

12. 28 U.S.C. § 1332(a) provides that "[t]he district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000...and is between – (1) [c]itizens of different States."

13. 28 U.S.C. § 1441(a), pertaining to removal of civil actions, provides, in pertinent part, that "...any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending."

14. 28 U.S.C. § 1332(c) provides that "[f]or purposes of this section and section 1441...(1) a corporation shall be deemed to be a citizen of every State...by which it has been incorporated and of the State...where it has its principal place of business...."

15. 28 U.S.C. § 1441(b)(1), pertaining to Removal Based on Diversity of Citizenship, provides that "[i]n determining whether a civil action is removable on the basis of the jurisdiction under Section 1332(a) of this title, the citizenship of defendants sued under fictitious names shall be disregarded."

16. Under 28 U.S.C. § 1446(b)(1) "[t]he notice of removal of a civil action or proceeding shall be filed within 30 days after the receipt by the defendant...of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based...."

17. In this present case, Plaintiffs aver that they are residents of the State of New Jersey. See Exhibit "A."

18. Plaintiffs aver that the alleged injury(ies) which is the subject of this litigation occurred in Buck County, PA, within the Eastern District of Pennsylvania.

19. As set forth above, GABE'S is a fictitious name and d/b/a for Gabriel Brothers, Inc. and Gabriel Brothers, Inc. is incorporated in West Virginia and has its principal place of business in West Virginia.

20. Pursuant to 28 U.S.C. § 1441(b)(1), the citizenship of any "Doe" defendants (designated in the Complaint as fictitious property owner and fictitious proper manager) shall be disregarded in assessing removal petitions claiming federal jurisdiction under 28 U.S.C. § 1332(a).

21. Plaintiffs demand damages in excess of \$50,000 in their Complaint and Plaintiffs' counsel did not respond to a request to limit damages to less than \$75,000 and, accordingly, it is presumed that Plaintiffs are seeking damages in excess of \$75,000.

22. Therefore, this case is appropriate for removal from state court to the United States District Court, Eastern District of Pennsylvania, pursuant to 28 U.S.C §1332(a)(1) and §1441(a) as complete diversity of citizenship exists between the Plaintiffs and the Defendants, and the amount in controversy exceeds \$75,000.00, exclusive of interest and costs.

23. This Notice of Removal complies with 28 U.S.C. § 1446(a) and (b) as it is being filed within thirty (30) days of the service of the pleading from which it has been ascertained that the case is removable and within one year of the commencement of the action. See Exhibit "B," Affidavit of Service reflective of service on December 10, 2021.

24. Further, all named defendants, Gabriel Brothers, Inc. and "GABE'S," consent to and join in removal as per 28 U.S.C. § 1446(b)(2)(A), (B) and (C).

25. Written notice of the filing of the Notice of Removal was given to all adverse parties in accordance with 28 U.S.C. §1446(d) and is noted in the attached Certificate of Service.

26. Promptly after filing in this Court and the assignment of a Civil Action Number, a Notice of Removal will be filed with the Philadelphia Court of Common Pleas, in accordance with 28 U.S.C. §1446(d).

27. Copies of all process, pleadings, and Orders served upon Defendants are attached hereto in accordance with 28 U.S.C. §1446(a).

WHEREFORE, Notice is given that this action is removed from the Philadelphia Court of Common Pleas to the United States District Court for the Eastern District of Pennsylvania.

MARSHALL DENNEHEY WARNER
COLEMAN & GOGGIN

/s/ Nicholas D. Bowers

BY:

EDWARD J. TUIITE
NICHOLAS D. BOWERS
*Attorneys for Defendants,
Gabriel Brothers, Inc. and "GABE'S"*
PA Attorney I.D. Nos. 34631/315198
2000 Market Street – Suite 2300
Philadelphia, PA 19103
(610) 354-8483/(215) 575-2742
*Attorneys for Defendants,
Gabriel Brothers, Inc. and "GABE'S"*

Dated: 1/6/22

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

CESAR CUCUL; and,	:	
VERONICA CUCUL	:	CIVIL ACTION
	:	
Plaintiffs	:	
	:	NO.
v.	:	
	:	
GABRIEL BROTHERS, INC.; and,	:	
	:	
GABE'S; and,	:	
	:	
JOHN DOES 1-10 (fictitious property	:	
Owner); and,	:	
	:	
JOHN DOES 11-21 (fictitious property	:	
Manager)	:	
	:	
Defendants	:	

CERTIFICATION

I, Nicholas D. Bowers, Esquire, hereby certify that the facts set forth in the foregoing
Petition for Removal are true and correct to the best of my knowledge, information, and belief.

MARSHALL DENNEHEY WARNER
COLEMAN & GOGGIN

/s/ Nicholas D. Bowers

BY:

EDWARD J. TUIITE
NICHOLAS D. BOWERS
*Attorneys for Defendants,
Gabriel Brothers, Inc. and "GABE'S"*
PA Attorney I.D. Nos. 34631/315198
2000 Market Street – Suite 2300
Philadelphia, PA 19103
(610) 354-8483/(215) 575-2742
*Attorneys for Defendants,
Gabriel Brothers, Inc. and "GABE'S"*

Dated: 1/6/22

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

CESAR CUCUL; and,	:	
VERONICA CUCUL	:	CIVIL ACTION
	:	
Plaintiffs	:	
	:	NO.
v.	:	
	:	
GABRIEL BROTHERS, INC.; and,	:	
	:	
GABE'S; and,	:	
	:	
JOHN DOES 1-10 (fictitious property	:	
Owner); and,	:	
	:	
JOHN DOES 11-21 (fictitious property	:	
Manager)	:	
	:	
Defendants	:	

CERTIFICATE OF SERVICE

I, Nicholas D. Bowers, Esquire, hereby certify that a true and correct copy of the foregoing Petition for Removal was served upon the following party via electronic service, on the below date:

Joel Rosenberg, Esquire
STARK & STARK
401 Route 73 North, Suite 130
Marlton, NJ 08053

MARSHALL DENNEHEY WARNER
COLEMAN & GOGGIN

Nicholas D. Bowers

BY: _____

NICHOLAS D. BOWERS

1/6/22

EXHIBIT “A”

Court of Common Pleas of Philadelphia County
Trial Division
Civil Cover Sheet

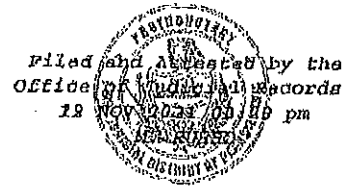
PLAINTIFFS NAME CESAR CUCUL		DEFENDANT'S NAME GABRIEL BROTHERS, INC.	
PLAINTIFFS ADDRESS 145 BROWNING AVENUE EWING NJ 08638		DEFENDANT'S ADDRESS 6720 FRANKFORD AVENUE PHILADELPHIA PA 19135-2104	
PLAINTIFFS NAME VERONICA CUCUL		DEFENDANT'S NAME GABRIEL	
PLAINTIFFS ADDRESS 145 BROWNING AVENUE EWING NJ 08638		DEFENDANT'S ADDRESS 495 S. OXFORD VALLEY ROAD SUITE A FAIRLESS HILLS PA 19030-2104	
PLAINTIFFS NAME		DEFENDANT'S NAME JOHN DOES 1-10 (FICTITIOUS PROPERTY OWNER)	
PLAINTIFFS ADDRESS		DEFENDANT'S ADDRESS 495 S. OXFORD VALLEY ROAD SUITE A FAIRLESS HILLS PA 19030-4202	
TOTAL NUMBER OF PLAINTIFFS 2	TOTAL NUMBER OF DEFENDANTS 4	COMMENCEMENT OF ACTION <input checked="" type="checkbox"/> Complaint <input type="checkbox"/> Petition Action <input type="checkbox"/> Notice of Appeal <input type="checkbox"/> Writ of Summons <input type="checkbox"/> Transfer From Other Jurisdictions	
AMOUNT IN CONTROVERSY <input type="checkbox"/> \$50,000.00 or less <input checked="" type="checkbox"/> More than \$50,000.00	COURT PROGRAMS <input type="checkbox"/> Arbitration <input type="checkbox"/> Mass Tort <input type="checkbox"/> Commerce <input type="checkbox"/> Settlement <input checked="" type="checkbox"/> Jury <input type="checkbox"/> Savings Action <input type="checkbox"/> Minor Court Appeal <input type="checkbox"/> Minors <input type="checkbox"/> Non-Jury <input type="checkbox"/> Petition <input type="checkbox"/> Statutory Appeals <input type="checkbox"/> W/D/Survival <input type="checkbox"/> Other:		
CASE TYPE AND CODE 20 - PERSONAL INJURY - OTHER			
STATUTORY BASIS FOR CAUSE OF ACTION			
RELATED PENDING CASES (LIST BY CASE CAPTION AND DOCKET NUMBER)		IS CASE SUBJECT TO COORDINATOR ORDER? YES NO	
FILED PRO PROTHY NOV 12 2021 S. RICE			
TO THE PROTHONOTARY: Kindly enter my appearance on behalf of Plaintiff/Petitioner/Appellant: <u>CESAR CUCUL , VERONICA CUCUL</u> Papers may be served at the address set forth below.			
NAME OF PLAINTIFF/PETITIONER/APPELLANT'S ATTORNEY JOEL R. ROSENBERG		ADDRESS 401 ROUTE 73 N #130 MARLTON NJ 08053	
PHONE NUMBER (856) 874-4443	FAX NUMBER (856) 874-0133		
SUPREME COURT IDENTIFICATION NO. 43841		E-MAIL ADDRESS jrosenberg@stark-stark.com	
SIGNATURE OF FILING ATTORNEY OR PARTY JOEL ROSENBERG		DATE SUBMITTED Friday, November 12, 2021, 04:49 pm	

Case ID: 211101069

FINAL COPY (Approved by the Prothonotary Clerk)

COMPLETE LIST OF DEFENDANTS:

1. GABRIEL BROTHERS, INC.
6720 FRANKFORD AVENUE
PHILADELPHIA PA 19135-2104
2. GABE'S
495 S. OXFORD VALLEY ROAD SUITE A
FAIRLESS HILLS PA 19030-2104
3. JOHN DOES 1-10 (FICTITIOUS PROPERTY OWNER)
495 S. OXFORD VALLEY ROAD SUITE A
FAIRLESS HILLS PA 19030-4202
4. JOHN DOES 11-21 (FICTITIOUS PROPERTY MANAGER)
6720 FRANKFORD AVENUE
PHILADELPHIA PA 19135-2104



STARK & STARK
 A Professional Corporation
 By: Joel R. Rosenberg - ID# 43841
 401 Route 73 North, Suite 130
 Marlton, NJ 08053
 Attorneys for Plaintiff

<p>CESAR CUCUL 145 Browning Avenue Ewing, New Jersey 08638 and VERONICA CUCUL 145 Browning Avenue Ewing, New Jersey 08638 Plaintiff</p> <p>vs.</p> <p>GABRIEL BROTHERS, INC. 6720 Frankford Avenue Philadelphia, PA 19135-2104 and GABE'S 495 S. Oxford Valley Road, Suite A Fairless Hills, PA 19030-4202 and JOHN DOES 1-10 (fictitious Property Owner) and JOHN DOES 11-21 (fictitious Property Manager) Defendants.</p>	<p>COURT OF COMMON PLEAS COUNTY OF PHILADELPHIA</p> <p>COMPLAINT IN CIVIL ACTION</p>
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COMPLAINT IN CIVIL ACTION
PREMISES LIABILITY

NOTICE TO DEFEND

You have been sued in court. If you wish to defend against the claim set forth in the following pages, you must take action within twenty (20) days after this complaint and notice are served, by entering a written appearance personally or by an attorney and filing in writing with the Court your defenses or objections to the claim set forth against you. You are warned that if you fail to do so, the case may proceed without further notice for any money claims in the complaint or for any other claim or relief requested by the plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW. THIS OFFICE CAN PROVIDE YOU WITH INFORMATION ABOUT HIRING A LAWYER.

IF YOU CANNOT AFFORD TO HIRE A LAWYER, THIS OFFICE MAY BE ABLE TO PROVIDE YOU WITH INFORMATION ABOUT AGENCIES THAT MAY OFFER LEGAL SERVICES TO ELIGIBLE PERSONS AT A REDUCED FEE OR NO FEE.

PHILADELPHIA BAR ASSOCIATION
LAWYER REFERRAL AND INFORMATION SERVICE
LEGAL - ONE READING CENTER
PHILADELPHIA, PENNSYLVANIA 19107
Telephone: 215-238-6333

AVISO

Le han demandado a usted en la corte. Si usted quiere defenderse de estas demandas expuestas en las páginas siguientes, usted tiene veinte (20) días de plazo al partir de la fecha de la demanda y la notificación. Hace falta asentar una comparencia escrita o en persona o con un abogado y entregar a la corte en forma escrita sus defensas o sus objeciones a las demandas en contra de su persona. Sea avisado que si usted no se defiende, la corte tomará medidas y puede continuar la demanda en contra suya sin previo aviso o notificación. Además, la corte puede decidir a favor del demandante y requiere que usted compla con todas las provisiones de esta demanda. Usted puede perder dinero o sus propiedades o otros derechos importantes para usted.

LLEVE ESTA DEMANDA A UN ABOGADO INMEDIATAMENTE. SI NO TIENE ABOGADO O SI NO TIENE EL DINERO SUFICIENTE DE PAGAR TAL SERVICIO, VAYA EN PERSONA O LLAME POR TELEFONO A LA OFICINA CUYA DIRECCION SE ENCUENTRA ESCRITA ABOJO PARA AVERIGUAR DONDE SE PUEDE CONSEGUIR ASISTENCIA LEGAL.

SI USTED NO PUEDE CONSERVAR LOS SERVICIOS DE UN ABOGADO, ESTA OFICINA PUEDE DARLE A USTED INFORMACIÓN SOBRE LAS AGENCIAS QUE OFERSEN SERVICIOS JURÍDICOS A LAS PERSONAS ELEGIBLES EN UN HONORARIO REDUCIDO O NINGÚN HONORARIO.

ASOCIACION DE LICENCIADOS DE FILADELFIA
SERVICIO DE REFERENCIA E INFORMACION
LEGAL
ONE READING CENTER
PHILADELPHIA, PENNSYLVANIA 19107
Telefono: 215-238-1701

STARK & STARK
 A Professional Corporation
 By: Joel R. Rosenberg - ID# 43841
 401 Route 73 North, Suite 130
 Marlton, NJ 08053
 Attorneys for Plaintiff

<p>CESAR CUCUL 145 Browning Avenue Ewing, New Jersey 08638 and VERONICA CUCUL 145 Browning Avenue Ewing, New Jersey 08638 Plaintiff</p> <p>vs.</p> <p>GABRIEL BROTHERS, INC. 6720 Frankford Avenue Philadelphia, PA 19135-2104 and GABE'S 495 S. Oxford Valley Road, Suite A Fairless Hills, PA 19030-4202 and JOHN DOES 1-10 (fictitious property owner) and JOHN DOES 11-21 (fictitious property manager) Defendants.</p>	<p>COURT OF COMMON PLEAS COUNTY OF PHILADELPHIA</p> <p>COMPLAINT IN CIVIL ACTION</p>
---	---

COMPLAINT IN CIVIL ACTION
PREMISES LIABILITY

1. Plaintiff, CESAR CUCUL, is an adult individual residing at 145 Browning Avenue, Ewing Township, New Jersey 08638.
2. Plaintiff, VERONICA CUCUL, is an adult individual residing at 145 Browning Avenue, in Ewing Township, New Jersey 08638.

3. Defendant, **GABRIEL BROTHERS, INC.**, is organized and exists under the laws of the Commonwealth of Pennsylvania having a regular place of business at 6720 Frankford Avenue, Philadelphia, PA 19135-2104.

4. Defendant, **GABE'S**, is organized and exists under the laws of the Commonwealth of Pennsylvania having a regular place of business at 495 S. Oxford Valley Road, Suite A Fairless Hills, PA 19030-4202.

5. Defendant, **GABRIEL BROTHERS, INC.**, acted or failed to act individually or through its agents, servants, workmen, and/or employees who were then and there acting within the course and scope of their employment with said Defendant and in furtherance of said Defendant's business.

6. Defendant, **GABE'S**, acted or failed to act individually or through its agents, servants, workmen, and/or employees who were then and there acting within the course and scope of their employment with said Defendant and in furtherance of said Defendant's business.

7. At present, the identities of Defendants, **JOHN DOES 1-10**, is unknown Property Owner. As such, "John Does 1-10", is a fictitious designation, representing one or more individuals, sole proprietorships, associations, limited partnerships, general partnerships, limited liability companies and/or corporations, which in any way owned, possessed, controlled, entrusted, insured, hired for and/or maintained the premises which caused or contributed to the fall at issue herein, or who were otherwise responsible, in whole or in part, for the said accident or the injuries sustained by the Plaintiff.

8. At all times material to this Civil Action, **JOHN DOES 1-10**, acted or failed to act individually or through its agents, servants, workmen, and/or employees who were then and there acting within the course and scope of their employment with said Defendant and in furtherance of said Defendant's business.

9. At present, the identities of Defendants, JOHN DOES 11-10, were responsible for maintaining the premises in a safe condition, free from hazards and other defects at the property located at 495 S. Oxford Valley Road, Suite A, Fairless Hills, PA 19030-4202.

10. At present, the identities of Defendants, JOHN DOES 11-21, is unknown Property Manager. As such, "John Does 11-21", is a fictitious designation, representing one or more individuals, sole proprietorships, associations, limited partnerships, general partnerships, limited liability companies and/or corporations, which in any way owned, possessed, controlled, entrusted, insured, hired for and/or maintained the premises which caused or contributed to the fall at issue herein, or who were otherwise responsible, in whole or in part, for the said accident or the injuries sustained by the Plaintiff.

11. At all times material to this Civil Action, JOHN DOES 11-21, acted or failed to act individually or through its agents, servants, workmen, and/or employees who were then and there acting within the course and scope of their employment with said Defendant and in furtherance of said Defendant's business.

12. Hereinafter, Defendants, GABRIEL BROTHERS, INC., GABE'S, JOHN DOES 11-10 (fictitious Property Owner), JOHN DOES 11-21 (fictitious Property Manager) shall collectively be referred to as "DEFENDANTS".

13. At all times, material to this Civil Action, DEFENDANTS owned, operated, managed, maintained, possessed, inspected, and controlled a certain premises and were primarily and/or secondarily liable and/or otherwise legally responsible to maintain the premises located at 495 S. Oxford Valley Road, Suite A, Fairless Hills, PA 19030-4202.

14. The DEFENDANTS had a duty to its business invitees and/or any lawful invitees walking at the aforesaid premises to keep the area in a safe condition and to maintain and/or inspect said premises and warn pedestrians, business invitees and/or other persons thereon of any hazardous conditions thereon.

15. At all times material to this Civil Action, DEFENDANTS acted or failed to act individually or through its agents, servants, workmen, and/or employees who were then and there acting within the course and scope of their employment with said Defendant and in furtherance of said Defendant's business.

16. At all times, material to this Civil Action, the Plaintiff, CESAR CUCUL, was a business invitee lawfully present upon the premises.

17. At all times, material to this Civil Action, DEFENDANTS either owned, operated, managed, maintained, possessed, inspected, and controlled a certain premises and were primarily and/or secondarily liable and/or otherwise legally responsible to maintain the premises located at 495 S. Oxford Valley Road, Suite A, Fabless Hills, PA 19030-4202.

18. On November 16, 2019, there existed a hazardous condition on the premises and area aforesaid, specifically a rack that collapsed upon Plaintiff. Notwithstanding their duty, on the date aforesaid, Defendants did carelessly and negligently create, allow and permit the hazardous condition to remain at the aforesaid location.

19. The DEFENDANTS created and/or knew or should have known of the existence of this hazardous condition, but permitted the aforesaid condition to exist.

20. On or about the November 16, 2019, the plaintiff was lawfully on the premises and area aforesaid, when, solely as a result of DEFENDANTS' negligence, carelessness, recklessness, willfulness and wantonness, the clothing rack collapsed upon plaintiff, causing the plaintiff to sustain the injuries more fully set forth herein below.

21. The aforesaid accident was caused by the negligence, carelessness, recklessness, willfulness and wantonness of the DEFENDANTS and consisted of the following:

- a. Created a dangerous condition which they knew or should have known about;
- b. Allowed a dangerous and defective condition to exist which they know or should have known about;
- c. Failed to properly remedy the condition which caused or created a defective and dangerous condition;
- d. Failed to inspect and correct the dangerous and defective condition, which they knew or should have known about;
- e. Failed to warn individuals such as Plaintiff, CESAR CUCUL, of the dangerous and defective condition;
- f. Failed to take proper and adequate steps to remedy the dangerous and defective condition;
- g. Allowed a danger, hazard to exist on the premises;
- h. Failed to adequately staff personnel to discover and correct the dangerous and defective condition;
- i. Operated their business in a manner which created a foreseeable risk of harm without taking reasonable measures to protect against the dangerous and defective condition;
- j. Failed to properly supervise or monitor their agents, servants, workmen and/or employees;
- k. Failed to control and/or provide a safe environment for pedestrian invitees, including tenants, such as Plaintiff, CESAR CUCUL;

- l. Failed to maintain the premises by permitting the dangerous and defective condition to exist;
- m. Failed to use due care and to employ reasonable skill in the performance of their duty;
- n. Violated applicable statutes and ordinances;
- o. Knew or should have known of the dangerous and defective condition, but nevertheless permitted said condition to remain in an unsafe, unsuitable, and dangerous condition for tenants living therein;
- p. Failed to use reasonable prudence or care in maintaining the premises;
- q. Failed to exercise reasonable care to inspect and/or discover the dangerous and defective condition;
- r. Otherwise conducted themselves in a negligent, careless and reckless manner; and
- s. Failed to take into account the rights, safety and position of Plaintiff, CESAR CUCUL.

COUNT I

22. Plaintiff, CESAR CUCUL, incorporates by reference Paragraphs 1 through 21 of the Complaint as if they were set forth at length herein.

23. Solely as a result of the aforesaid negligence, carelessness, recklessness, wantonness and willfulness of all DEFENDANTS as aforesaid, Plaintiff, CESAR CUCUL, has sustained injuries in or about her body and extremities, which injuries are and may be serious, severe and permanent and/or may have aggravated a previously existing condition. The plaintiff, CESAR

CUCUL, sustained injuries including but not limited to the following:

(a) Serious and permanent personal injuries, including but not limited to:

1. Partial undersurface tear of the distal anterior supraspinatus tendon
2. Closed head injury
3. Neck pain
4. Contusion left shoulder
5. Contusion left back wall of thorax
6. Contusion of right back wall of thorax
7. Left shoulder pain
8. Muscle weakness

(b) Past medical expenses incurred for the diagnosis, treatment and cure of the said personal injuries;

- (c) Future medical expenses incurred for the diagnosis, treatment and cure of the said personal injuries;
- (d) Lost earnings;
- (e) Lost earning capacity;
- (f) Past pain;
- (g) Future pain;
- (h) Past suffering;
- (i) Future suffering;
- (j) Embarrassment and humiliation;
- (k) Past loss of enjoyment of life;
- (l) Future loss of enjoyment of life; and
- (m) Other injuries and damages suffered as a natural and probable result of the said personal injuries.

24. As a further, direct and proximate result of the aforesaid incident, Plaintiff, CESAR CUCUL, in the past and may in the future suffer severe pain and suffering in that she has been required in the past, and may require the expenditure of various and substantial sums of money for surgery, medical treatment, medication and devices in an effort to alleviate and cure herself of the aforementioned injuries, all to his great detriment and loss, both financial and otherwise.

25. As a further result of Defendants' negligence, Plaintiff has been caused and will in the future be caused to be unable to pursue her usual activities.

26. As a further result of this accident, Plaintiff has or may suffer a severe loss because of expenses which have been or may be reasonably incurred in obtaining ordinary and necessary services in lieu of those which the plaintiff would have performed, not for income, but for the benefit of herself, if she had not been so injured.

27. As a further result of the defendants' negligence, Plaintiff has suffered a physical impairment which prevents her from performing all or substantially all of the material acts and duties of her customary and usual daily activities, all to her great financial detriment.

WHEREFORE, Plaintiff, CESAR CUCUL, demands judgment in her favor and against Defendants, GABRIEL BROTHERS, INC., GABE'S, JOHN DOES 1-10 (fictitious Property Owner), JOHN DOES 11-21 (fictitious Property Manager), jointly, severally or in the alternative, for damages in excess of Fifty Thousand (\$50,000.00) Dollars.

COUNT II – PER QUOD

28. Plaintiff, VERONICA CUCUL, incorporates by reference Paragraphs 1 through 27 as though fully set forth herein.

29. At all times relevant herein, the Plaintiff, VERONICA CUCUL, was and continues to be the wife of the Plaintiff, CESAR CUCUL, residing with him, at the above address.

30. Solely as a result of the negligence, carelessness and recklessness of the DEFENDANTS set forth herein above, and the resultant injuries of the Plaintiff, CESDAR CUCUL, the Plaintiff, VERONICA CUCUL, has been deprived of the assistance, society and consortium of her said husband and will continue to be so deprived for an indefinite period of time in the future. WHEREFORE, Plaintiff, VERONICA CUCUL, demands judgment in his favor and against Defendants, GABRIEL BROTHERS, INC., GABE'S, JOHN DOES 1-10 (fictitious Property Owner), JOHN DOES 11-21 (fictitious Property Manager), jointly, severally or in the alternative, for damages in excess of Fifty Thousand (\$50,000.00) Dollars.

STARK & STARK, P.C.
A Professional Corporation
Attorneys for Plaintiffs

By: 

JOEL R. ROSENBERG

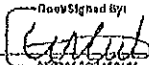
Date: November 11, 2021

DocuSign Envelope ID: 7B740F87-7847-4CB2-81A6-488E86EAD3B8

VERIFICATION

CESAR CUCUL hereby states that he is the plaintiff herein and that the facts set forth in the foregoing Complaint in Civil Action are true and correct to the best of his knowledge, information and belief and is based upon information which he has furnished to his counsel and information which has been gathered by his counsel in the preparation of the lawsuit. The language in the Complaint is that of counsel and not plaintiff. Plaintiff has read the Complaint, and to the extent that it is based upon information which he has given to his counsel, it is true and correct to the best of his knowledge, information and belief. To the extent that the content of the Complaint is that of counsel, plaintiff has relied upon counsel in making this verification. This Verification is subject to 18 Pa.C.S. Section 4904 which provides for certain penalties for making false statements.

Date: November 11, 2021

DocuSign Envelope ID: 7B740F87-7847-4CB2-81A6-488E86EAD3B8

Cesar Cucul

Case ID: 211101069

DocuSign Envelope ID: DDF0CAB3-E852-4D17-B129-CAA601B69F1F

VERIFICATION

VERONICA CUCUL hereby states that she is the plaintiff herein and that the facts set forth in the foregoing Complaint in Civil Action are true and correct to the best of her knowledge, information and belief and is based upon information which she has furnished to her counsel and information which has been gathered by her counsel in the preparation of the lawsuit. The language in the Complaint is that of counsel and not plaintiff. Plaintiff has read the Complaint, and to the extent that it is based upon information which she has given to her counsel, it is true and correct to the best of her knowledge, information and belief. To the extent that the content of the Complaint is that of counsel, plaintiff has relied upon counsel in making this verification. This Verification is subject to 18 Pa.C.S. Section 4904 which provides for certain penalties for making false statements.

Date: November 11, 2021

Deceased for

Veronica Cucul

Case ID: 211101069

EXHIBIT “B”

CESAR CUCUL, ET AL

Plaintiff

vs

GABRIEL BROTHERS, INC., ET AL

Defendant

Person to be served (Name and Address):

GABRIEL BROTHERS, INC.
55 SCOTT AVENUE
MORGANTOWN WV 26508

By serving: CT CORPORATION SYSTEM ALLEGHENY

Attorney: JOEL R. ROSENBERG, ESQ.

Papers Served: PRAECIPE TO REINSTATE COMPLAINT, CIVIL COVER
SHEET, COMPLAINT, NOTICE, VERIFICATIONS,Service Data: ☐ Served Successfully ☐ Not ServedDate/Time: 12-16-2021 11:55 EST☐ Delivered a copy to him/her personally☐ Left a copy with a competent household member over 14 years of age residing
therein (Indicate name & relationship at right)☒ Left a copy with a person authorized to accept service, e.g. managing agent,
registered agent, etc. (Indicate name & official title at right)Stephanie Terney
Stephanie Terney

Description of Person Accepting Service:

SEX: F AGE: 28 HEIGHT: 5'10" WEIGHT: 250 SKIN: white HAIR: Brown OTHER: _____

Unserved:

- ☐ Defendant is unknown at the address furnished by the attorney
☐ All reasonable inquiries suggest defendant moved to an undetermined address
☐ No such street in municipality
☐ Defendant is evading service
☐ Appears vacant
☐ No response on: _____

Date/Time: _____
Date/Time: _____
Date/Time: _____

Other: _____

To Be Used Where Electronic Signature Not Available

Served Data:

Subscribed and Sworn to me this

_____ day of _____, 20____

Notary Signature: _____

Name of Notary _____ Commission Expiration _____

DocuSign Court Approved E-Signature

Mark K. Terneywas at the time of service a competent adult, over the age of 18 and
not having direct interest in the litigation. I declare under penalty of
perjury that the foregoing is true and correct.Mark K. Terney
Signature of Process Server12/10/2021
Date
11:55
EST

Name of Private Server: _____ Address: 2009 Morris Avenue UNION, NJ 07083 Phone: (800) 672-1952

AFFIDAVIT OF SERVICE
(For Use by Private Service)

Cost of Service pursuant to R. 4:4-3(c)

\$ _____

Name of Person Served and relationship/title:

Stephanie Terney
Authorized to accept

Case ID: 211101069

STATE OF NEW JERSEY

COUNTY OF Union ss:
(County where notarized)

SHERIFF SERVED CERTIFICATION

INDEX/DOCKET # Nov Term 2021

GSS#: 20211207181237

NO COPIES

To Whom It May Concern:

The entity listed below was served via a Sheriff.

Gabriel Brothers Inc
(Name of person)

55 Scott Avenue
(Street address)

Morgantown WV 26508
(City/Town/Village; State; Zip Code)

Since Sheriffs are sworn officers of the Court, it is not required for them to have their signature notarized.

[Signature]

[Signature]
(Sign your name in the presence of a Notary Public)

[Signature]
(Print your name)

Sworn to before me this

20 day of DECEMBER, 2021

EXHIBIT “C”

CESAR CUCUL AND VERONICA CUCUL
(H/W)

Plaintiffs,

vs.

GABRIEL BROTHERS, INC.; and,

GABE'S; and,

JOHN DOES 1-10 (fictitious Property Owner);
and,

JOHN DOES 11-21 (fictitious Property
manager)

Defendants.

Filed and Attested by the
Office of Judicial Records
29 DEC 2021 04:34 pm

COURT OF COMMON PLEAS
PHILADELPHIA COUNTY

NOVEMBER TERM, 2021

NO. 01069

ORDER

AND NOW, this _____ day of _____, 2022, upon consideration of the Preliminary Objections of Defendant, Gabriel Brothers, Inc. d/b/a GABE'S (improperly designated in Plaintiff's Complaint as Gabriel Brothers, Inc. and "GABE'S"), to Plaintiffs' Complaint, and any response thereto,

It is hereby **ORDERED** and **DECREED** that the Preliminary Objections of Moving Defendant(s) are **SUSTAINED** and the above-captioned case is hereby **DISMISSED AND TRANSFERRED** from the Court of Common Pleas of Philadelphia County to the Court of Common Pleas of Bucks County, PA.

BY THE COURT:

J.

CESAR CUCUL AND VERONICA CUCUL (H/W)	:	
	:	
Plaintiffs,	:	COURT OF COMMON PLEAS PHILADELPHIA COUNTY
	:	
vs.	:	NOVEMBER TERM, 2021
	:	
GABRIEL BROTHERS, INC.; and,	:	NO. 01069
	:	
GABE'S; and,	:	
	:	
JOHN DOES 1-10 (fictitious Property Owner); and,	:	
	:	
JOHN DOES 11-21 (fictitious Property manager)	:	
	:	
Defendants.	:	

ALTERNATE ORDER

AND NOW, this _____ day of _____, 2022, upon consideration of the Preliminary Objections of Defendant, Gabriel Brothers, Inc. d/b/a GABE'S (improperly designated in Plaintiff's Complaint as Gabriel Brothers, Inc. and "GABE'S"), to Plaintiffs' Complaint, and any response thereto,

It is hereby **ORDERED** and **DECREED** that the Preliminary Objections of Moving Defendant are **SUSTAINED** and, any and all references to, and allegations of, recklessness and wantonness, including but not limited to those found in Paragraphs 20, 21, 23 and 30 of Plaintiffs' Complaint, are hereby **STRICKEN WITH PREJUDICE**.

BY THE COURT:

J.

**MARSHALL DENNEHEY WARNER
COLEMAN & GOGGIN**

By: EDWARD J. TUITE, ESQUIRE
NICHOLAS D. BOWERS, ESQUIRE

Identification Nos.: 34631/315198

(610) 354-8483/(215) 575-2742

2000 Market Street – 23rd Floor

Philadelphia, PA 19103

ejtuite@mdwecg.com

ndbowers@mdwecg.com

CESAR CUCUL AND VERONICA CUCUL	:	
(H/W)	:	
	:	
Plaintiffs,	:	COURT OF COMMON PLEAS
	:	PHILADELPHIA COUNTY
	:	
vs.	:	NOVEMBER TERM, 2021
	:	
GABRIEL BROTHERS, INC.; and,	:	NO. 01069
	:	
GABE'S; and,	:	
	:	
JOHN DOES 1-10 (fictitious Property Owner);	:	
and,	:	
	:	
JOHN DOES 11-21 (fictitious Property	:	
manager)	:	
	:	
Defendants.	:	

**PRELIMINARY OBJECTIONS BY DEFENDANT, GABRIEL BROTHERS, INC. D/B/A
GABE'S (IMPROPERLY DESIGNATED AS GABRIEL BROTHERS), TO PLAINTIFF'S
COMPLAINT**

Defendant, Gabriel Brothers, Inc. d/b/a GABE'S, improperly designated in the Complaint as two separate entities (hereinafter "Gabriel Brothers, Inc. d/b/a GABE'S or Moving Defendant"), by and through its undersigned counsel, Marshall Dennehey Warner Coleman and Goggin, hereby submits the following Preliminary Objections to Plaintiffs' Complaint, pursuant to Pa.R.C.P. 1028, and in support thereof, avers the following:

1. Plaintiffs, Cesar Cucul and Veronica Cucul, filed their Complaint against Defendants on or about November 29, 2021. See Plaintiffs' Complaint, attached hereto as Exhibit "A."

2. On information and belief, Plaintiffs served Defendant, Gabriel Brothers, Inc. d/b/a GABE'S, at corporate headquarters, located in West Virginia at 55 Scott Avenue, Morgantown, WV 26508, on or about December 10, 2021.

3. Per the Complaint, Plaintiffs, Cesar Cucul and Veronica Cucul, are, at all times relevant, residents of the State of New Jersey, residing at 145 Browning Avenue, Ewing, NJ 08638.

4. Defendant, Gabriel Brothers, Inc. is a West Virginia corporation, headquartered at 55 Scott Avenue, Morgantown, WV 26508. See Affidavit of Ryan N. Armstrong, Esq., Corporate Counsel at Gabriel Brothers, attached hereto as Exhibit "B."

5. "GABE'S" is a fictitious name and a d/b/a for Gabriel Brothers, Inc. See Exhibit "B."

6. Plaintiffs allege in their Complaint that, on or about November 16, 2019, Plaintiff, Cesar Cucul, was a business invitee at a Gabriel Brothers, Inc., d/b/a GABE'S store located in Bucks County, PA, at 495 S. Oxford Valley Road, Suite A, Fairless Hills, PA 19030-4202, when he was injured.

7. Gabriel Brothers, Inc. d/b/a GABE'S is a privately held retailer headquartered in Morgantown, West Virginia. See Exhibit "B."

8. "GABE'S," a fictitious name, is not a business entity of any form nor a proper jural entity. See Exhibit "B."

9. Gabriel Brothers, Inc. d/b/a GABE'S does not manufacture or build its own products. See Exhibit "B."
10. Gabriel Brothers, Inc. d/b/a GABE'S principal place of business is located at 55 Scott Avenue, Morgantown, WV 26508. See Exhibit "B."
11. Gabriel Brothers, Inc. d/b/a GABE'S has 120 retail store locations, branded as "GABE'S," none of which are located within Philadelphia, Pennsylvania. See Exhibit "B."
12. Gabriel Brothers, Inc. d/b/a GABE'S did not own any real property located in Philadelphia, Pennsylvania during the five year time period preceding the date of this Affidavit through the present. See Exhibit "B."
13. Gabriel Brothers, Inc. d/b/a GABE'S, a West Virginia Corporation and defendant herein, did not own nor occupy a place of business and/or other real estate located at 6720 Frankford Avenue, Philadelphia, PA 19135-2104 during the five year time period preceding the date of this Affidavit through the present. See Exhibit "B."
14. Gabriel Brothers, Inc. d/b/a GABE'S has not rented, leased or otherwise occupied real property in Philadelphia, Pennsylvania during the five year time period preceding the date of this Affidavit through the present. See Exhibit "B."
15. During the five year time period preceding the date of this Affidavit through the present, Gabriel Brothers, Inc. d/b/a GABE'S has not maintained a telephone number, drop box nor mailing address in Philadelphia County. See Exhibit "B."
16. During the five year time period preceding the date of this Affidavit through the present, Gabriel Brothers, Inc. d/b/a GABE'S made no in-store sales in Philadelphia County. See Exhibit "B."

17. During the five year time period preceding the date of this Affidavit through the present, employees of Gabriel Brothers, Inc. d/b/a GABE'S did not travel into Philadelphia County for purposes of selling or providing products or services to customer(s) domiciled in Philadelphia County. See Exhibit "B."

18. Gabriel Brothers, Inc. d/b/a GABE'S has not "regularly conducted business" in Philadelphia County during the five year time period preceding the date of this Affidavit through the present. See Exhibit "B."

19. Plaintiffs allege, in Paragraphs 18 and 20 of the Complaint that on or about November 16, 2019 an accident occurred wherein a clothing rack collapsed on Plaintiff Cucul. See Exhibit "A" at ¶¶ 18 and 20.

20. On information and belief, Paragraphs 18 and 20 provide the only factual descriptions of the alleged accident and such descriptions are appear limited to a total of two repetitive sentences, summarized above. See Exhibit "A" at ¶¶ 18 and 20.

21. Notwithstanding the foregoing, within paragraphs 20, 21, 23 and 30 of the Complaint, Plaintiffs accuse Defendants of "recklessness" and "wantonness." See Exhibit "A" at ¶¶ 20, 21, 23 and 30.

22. Pa.R.C.P. 1019(a) requires a party to formulate the issues in a complaint by summarizing the facts essential to support the claim.

23. Pa.R.C.P. 1028 (a)(1) states that Preliminary Objections may be filed for "...improper venue...."

24. Pa.R.C.P. 1028 (a)(3) states that Preliminary Objections may be filed for "insufficient specificity in a pleading."

25. Pa.R.C.P. 1028 (a)(4) states that Preliminary Objections may be filed for "legal insufficiency of a pleading (demurrer)."

26. Moving Defendant now timely file these preliminary objections.

I. PRELIMINARY OBJECTION PURSUANT TO PA.R.C.P. 1028(a)(1) and 1028(a)(4): MOTION TO DISMISS DUE TO IMPROPER VENUE

27. Moving Defendant, Gabriel Brothers, Inc. d/b/a GABE'S, incorporates and reasserts the averments of paragraphs 1 through 26 of these Preliminary Objections as though the same were set forth herein at length.

28. A plaintiff's choice of forum is to be given weight, and the burden is on the party challenging the choice to show it was improper; however, a plaintiff's choice of venue is not absolute or unassailable. If there exists any proper basis for the trial court's decision to grant a petition to transfer venue, the decision must stand. Forrester v. Hanson, 901 A.2d 548, 552 (Pa. Super. 2006) (citation omitted).

29. Pursuant to 1006(b), "[a]ctions against the following defendants, except as otherwise provided in subdivision (c), may be brought in and only in the counties designated by the following rules: political subdivisions, Rule 2103; partnerships, Rule 2130; unincorporated associations, Rule 2156; corporations and similar entities, Rule 2179."

30. Pennsylvania Rule of Civil Procedure 2179 states that:

(a) Except as otherwise provided by an Act of Assembly, by Rule 1006(a.1) or by subdivision (b) of this rule, a personal action against a corporation or a similar entity may be brought in and only in:

- (1) the county where its registered office or principal place of business is located;
- (2) a county where it regularly conducts business;
- (3) the county where the cause of action arose;

- (4) a county where a transaction or occurrence took place out of which the cause of action arose, or
- (5) a county where the property or part of the property which is the subject matter of the action is located provided that equitable relief is sought with respect to the property.

Pa.R.C.P. 2179(a).

31. In the present matter, Pa.R.C.P. 2179(1)(3), (4) and (5) are inapplicable on the face of the Complaint insofar as this is a premises liability action and Plaintiffs allege that the alleged accident in question occurred at a store located in Bucks County, PA (Fairless Hills, PA).

32. Pa.R.C.P. 2179(a)(1) also does not establish venue in Philadelphia County insofar as Plaintiff's allegation that Moving Defendant (Gabriel Brothers, Inc. and/or "GABE'S") has a "regular place of business" at 6720 Frankford Avenue, Philadelphia, PA is factually wrong and, in fact, Moving Defendant neither owned nor occupied any real estate located in Philadelphia County at any time relevant to this litigation. See Exhibit "B," Affidavit of Ryan Armstrong.

33. Accordingly, it appears Plaintiffs are seeking to rely upon 2179(a)(2). Importantly, however, none of the Defendants "regularly conducted business" in Philadelphia during any relevant time period and thus Plaintiffs' reliance upon 2179(a)(2) is misplaced.

34. In order to be deemed as "regularly conducting business" in a particular county, a business entity must perform acts in a county of sufficient quality and quantity before venue will be established. See Zampana-Barry v. Donoghue, 921 A.2d 500, 503 (Pa. Super. 2007) *appeal denied*, 940 A.2d 366 (Pa 2007) (citing Purcell v. Bryn Mawr Hosp., 579 A.2d 1282 (Pa. 1990)). Quality of acts will be found if an entity performs acts in a county that directly further or are essential to the entity's business objective. Zampana-Barry, 921 A.2d at 503. Incidental acts, including advertising, solicitation of business, education programs, hiring personnel, and purchase of supplies, which "aid a main purpose are collateral" and not deemed necessary to an

entity's existence. Id. at 503-04. Quantity of acts means those that are sufficiently continuous so as to be considered habitual. Id. at 504. Each case must be based upon its own individual facts. Id.

35. Courts of this Commonwealth have repeatedly held that for the purposes of venue by way of Pa.R.C.P. 2179(a)(2), the "defendant must have had physical presence in the county" Levey v. Cogen Sklar L.L.P., 2002 Phila. Ct. Com. Pl. LEXIS 86, at *5 (Apr. 11, 2002) (citations omitted) (emphasis added); Gale v. Mercy Catholic Med. Ctr. Eastwick, Inc., 698 A.2d 647, 652 (Pa. Super. Ct. 1997); Canter v. Am. Honda Motor Corp., 231 A.2d 140, 143 (Pa. 1967). "[W]here the defendant never entered the county in furtherance of the corporate objective, the mere fact that the defendant conducted some of its business with county residents [is] not sufficient to confer venue." Feltoon v. Nolen, 2002 Phila. Ct. Com. Pl. LEXIS 60, at *10 (Nov. 1, 2002); Masel v. Glassman, 689 A.2d 314, 318-19 (Pa. Super. Ct. 1997) (holding that venue was improper in Philadelphia County when physician services company received 20% of gross revenues from Philadelphia third party payers and 3% from Philadelphia residents, but conducted no operations in Philadelphia).

36. In the present matter, Defendants did not regularly conduct(ed) business in Philadelphia County at any relevant time.

37. Specifically, Gabriel Brothers, Inc. d/b/a GABE'S is a retailer whose business includes 113 retail stores. None of these stores are located within Philadelphia County.

38. Gabriel Brothers, Inc. d/b/a GABE'S employees do not travel into Philadelphia County for business purposes.

39. Gabriel Brothers, Inc. d/b/a GABE'S has no physical presence within Philadelphia County.

40. Gabriel Brothers, Inc. d/b/a GABE'S, moreover, does not have a "regular place of business" at 6720 Frankford Avenue, Philadelphia PA 19135-2104 and this allegation in the Complaint is simply factually wrong and inaccurate. See e.g., Exhibit "B."

41. In accord with the foregoing, Plaintiff cannot establish venue in Philadelphia County pursuant to Pa.R.C.P. 2179(a)(1), (2), (3), (4) or (5).

42. Moreover, it is respectfully suggested that it is clear that Bucks County is the appropriate State Court venue for this litigation as this is a premises liability action and the premises where Plaintiff Cesar Cucul claims he was injured is located in Buck County, PA.

43. Accordingly, it is respectfully submitted that this case should be dismissed and transferred to the Bucks County Court of Common Pleas.

WHEREFORE, Defendant, Gabriel Brothers, Inc. d/b/a GABE'S, respectfully requests that this Honorable Court sustain its Preliminary Objections and enter the attached Proposed Order, transferring this action to Bucks County, PA.

II. PRELIMINARY OBJECTION PURSUANT TO PA.R.C.P. 1028(a)(3) AND 1028(a)(4): MOTION TO STRIKE PLAINTIFF'S ALLEGATIONS OF RECKLESSNESS

44. Moving Defendant incorporates and reasserts the averments of paragraphs 1 through 43 of these Preliminary Objections as though the same were set forth herein at length.

45. In Paragraphs 20, 21, 23 and 30 of the Complaint, Plaintiff alleges Defendants engaged in "recklessness." See Exhibit "A" at ¶¶ 20, 21, 23 and 30.

46. In Paragraphs 20, 21 and 23 of the Complaint, Plaintiff alleges Defendants engaged in "wantonness." See Exhibit "A" at ¶¶ 20, 21 and 23.

47. Pennsylvania courts define "recklessness" by reference to Section 500 of the Restatement (Second) of Torts which provides that:

The actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.

See Stubbs v. Frazer, 454 A.2d 119, 120 (Pa. Super. 1982) (quoting Restatement (Second) of Torts, § 500 (1965)).

48. Comment g of Section 500 of the Restatement (Second) of Torts compares reckless conduct to negligence as follows:

Reckless misconduct differs from negligence in several important particulars. It differs from that form of negligence which consists in mere inadvertence, incompetence, unskillfulness, or a failure to take precautions to enable the actor adequately to cope with a possible or probable future emergency, in that reckless misconduct requires a conscious choice of a course of action, either with knowledge of the serious danger to others involved in it or with knowledge of facts which would disclose this danger to any reasonable man . . .

Id.

49. Accordingly, an allegation of recklessness must demonstrate that “the actor has intentionally done an act of an unreasonable character, in disregard to a risk known to him or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow.” Evans v. Philadelphia Transp. Co., 212 A.2d 440, 443 (Pa. 1965) (citations omitted); see also Lewis v. Miller, 543 A.2d 590, 592 (Pa. Super. 1988).

50. Pennsylvania courts have opined that “[i]n order for conduct to be considered reckless, it must involve an easily perceptible danger of death or substantial physical harm, and the probability that it will so result must be substantially greater than is required for ordinary negligence . . .” Zazzera v. Roche, 54 Pa. D. & C.4th 225, 232, 2001 WL 1846971 (Lackawanna

Cty. Ct. Com. Pl. Dec. 10, 2001) (quoting *Hall v. Jackson*, 788 A.2d 390, 403, ¶ 31 (Pa. Super. 2001) (emphasis added)).

51. To be considered reckless, the actor “must recognize that his conduct involves a risk substantially greater in amount than that which is necessary to make his conduct negligent.” *Id.* Therefore, in order to allege that a defendant acted “recklessly,” a plaintiff must allege facts showing that the defendant possessed this requisite mental state and acted consciously in a way that he knew created the substantial risk of harm to others. *Gaul v. Consol. Rail Corp.*, 556 A.2d 892, 898 (Pa. Super. 1989).

52. Plaintiff fails to set forth specific facts to support any allegation that Green Lake had knowledge of acts or conduct that created a high risk of physical harm to Plaintiff, or that Green Lake consciously acted with disregard or indifference to an alleged serious danger to Plaintiff. *See generally Stubbs v. Frazer*, 454 A.2d 119, 120 (Pa. Super. 1982).

53. Since no specific facts are alleged that establish that Defendants acted recklessly in any action or conduct it undertook, pursuant to Pa. R.C.P. 1028(a)(4), Plaintiff’s references to alleged “recklessness” in paragraph 20, 21, 23 and 30 of the Complaint must be stricken and dismissed.

54. Allegations of wantonness, contained in paragraphs 20, 21 and 23 of the Complaint should likewise be stricken with prejudice pursuant to the rationale set forth above.

55. Accordingly, in the absence of facts plead to support allegations of recklessness and wantonness, such allegations should be stricken from Plaintiffs’ Complaint pursuant to Pa.R.C.P. 1028(a)(3) and Pa.R.C.P. 1028(a)(4).

WHEREFORE, Defendant, Gabriel Brothers, Inc. d/b/a GABE'S, respectfully requests that this Honorable Court sustain its Preliminary Objections and enter the attached Proposed Alternate Order, striking Plaintiffs' allegations of recklessness and wantonness.

MARSHALL DENNEHEY WARNER
COLEMAN & GOGGIN

/s/ Nicholas D. Bowers

BY: _____

EDWARD J. TUIE, ESQUIRE
NICHOLAS D. BOWERS, ESQUIRE
*Attorneys for Defendant, Gabriel Brothers,
Inc. d/b/a GABE'S*

Dated: 12/29/21

MARSHALL DENNEHEY WARNER**COLEMAN & GOGGIN**

By: EDWARD J. TUIE, ESQUIRE
NICHOLAS D. BOWERS, ESQUIRE

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CESAR CUCUL AND VERONICA CUCUL
(H/W)

Plaintiffs,

vs.

GABRIEL BROTHERS, INC.; and,

GABE'S; and,

JOHN DOES 1-10 (fictitious Property Owner);
and,

JOHN DOES 11-21 (fictitious Property
manager)

Defendants.

COURT OF COMMON PLEAS
PHILADELPHIA COUNTY

NOVEMBER TERM, 2021

NO. 01069

**MEMORANDUM OF LAW IN SUPPORT OF PRELIMINARY OBJECTIONS BY
DEFENDANT, GABRIEL BROTHERS, INC. D/B/A GABE'S, TO PLAINTIFF'S
COMPLAINT**

I. MATTER BEFORE THE COURT

The matter before the Court is the Preliminary Objections of Defendants, Gabriel Brothers, Inc. d/b/a GABE'S (improperly designated in the Complaint as two separate entities) to Plaintiffs' Complaint.

II. STATEMENT OF QUESTIONS INVOLVED

(1). Should this Honorable Court sustain Defendants, Gabriel Brothers, Inc. and GABE'S (hereinafter "Gabriel Brothers, Inc. d/b/a GABE'S" or "Moving Defendant"), Preliminary Objections and dismiss Plaintiffs' Complaint and transfer this action to Blair County, PA because Plaintiffs cannot establish venue in Philadelphia County pursuant to Pa.R.C.P. 2179?

Suggested Answer: Yes.

(2). Should this Honorable Court sustain Moving Defendant's Preliminary Objections and strike with prejudice all allegations of "recklessness" and "wantonness"?

Suggested Answer: Yes.

III. FACTUAL BACKGROUND

Plaintiffs, Cesar Cucul and Veronica Cucul, filed their Complaint against Defendants on or about November 29, 2021. See Plaintiffs' Complaint, attached hereto as Exhibit "A." On information and belief, Plaintiffs served Defendant, Gabriel Brothers, Inc. d/b/a GABE'S, at corporate headquarters, located in West Virginia at 55 Scott Avenue, Morgantown, WV 26508, on or about December 10, 2021.

Per the Complaint, Plaintiffs, Cesar Cucul and Veronica Cucul, are, at all times relevant, residents of the State of New Jersey, residing at 145 Browning Avenue, Ewing, NJ 08638. Defendant, Gabriel Brothers, Inc. is a West Virginia corporation, headquartered at 55 Scott Avenue, Morgantown, WV 26508. See Affidavit of Ryan N. Armstrong, Esq., Corporate Counsel at Gabriel Brothers, attached hereto as Exhibit "B." "GABE'S" is a fictitious name and a d/b/a for Gabriel Brothers, Inc. See Exhibit "B." Plaintiffs allege in their Complaint that, on or about November 16, 2019, Plaintiff, Cesar Cucul, was a business invitee at a Gabriel Brothers, Inc., d/b/a

GABE'S store located in Bucks County, PA, at 495 S. Oxford Valley Road, Suite A, Fairless Hills, PA 19030-4202, when he was injured.

Gabriel Brothers, Inc. d/b/a GABE'S is a privately held retailer headquartered in Morgantown, West Virginia. See Exhibit "B." "GABE'S," a fictitious name, is not a business entity of any form nor a proper jural entity. See Exhibit "B." Gabriel Brothers, Inc. d/b/a GABE'S does not manufacture or build its own products. See Exhibit "B." Gabriel Brothers, Inc. d/b/a GABE'S principal place of business is located at 55 Scott Avenue, Morgantown, WV 26508. See Exhibit "B."

Gabriel Brothers, Inc. d/b/a GABE'S has 120 retail store locations, branded as "GABE'S," none of which are located within Philadelphia, Pennsylvania. See Exhibit "B." Gabriel Brothers, Inc. d/b/a GABE'S did not own any real property located in Philadelphia, Pennsylvania during the five year time period preceding the date of this Affidavit through the present. See Exhibit "B." Gabriel Brothers, Inc. d/b/a GABE'S, a West Virginia Corporation and defendant herein, did not own nor occupy a place of business and/or other real estate located at 6720 Frankford Avenue, Philadelphia, PA 19135-2104 during the five year time period preceding the date of this Affidavit through the present. See Exhibit "B." Gabriel Brothers, Inc. d/b/a GABE'S has not rented, leased or otherwise occupied real property in Philadelphia, Pennsylvania during the five year time period preceding the date of this Affidavit through the present. See Exhibit "B."

During the five year time period preceding the date of this Affidavit through the present, Gabriel Brothers, Inc. d/b/a GABE'S has not maintained a telephone number, drop box nor mailing address in Philadelphia County. See Exhibit "B." During the five year time period preceding the date of this Affidavit through the present, Gabriel Brothers, Inc. d/b/a GABE'S

made no in-store sales in Philadelphia County. See Exhibit “B.” During the five year time period preceding the date of this Affidavit through the present, employees of Gabriel Brothers, Inc. d/b/a GABE’S did not travel into Philadelphia County for purposes of selling or providing products or services to customer(s) domiciled in Philadelphia County. See Exhibit “B.”

Gabriel Brothers, Inc. d/b/a GABE’S has not “regularly conducted business” in Philadelphia County during the five year time period preceding the date of this Affidavit through the present. See Exhibit “B.”

Plaintiffs allege, in Paragraphs 18 and 20 of the Complaint that on or about November 16, 2019 an accident occurred wherein a clothing rack collapsed on Plaintiff Cucul. See Exhibit “A” at ¶¶ 18 and 20. On information and belief, Paragraphs 18 and 20 provide the only factual descriptions of the alleged accident and such descriptions are appear limited to a total of two repetitive sentences, summarized above. See Exhibit “A” at ¶¶ 18 and 20. Notwithstanding the foregoing, within paragraphs 20, 21, 23 and 30 of the Complaint, Plaintiffs accuse Defendants of “recklessness” and “wantonness.” See Exhibit “A” at ¶¶ 20, 21, 23 and 30.

IV. LEGAL ARGUMENT

A. Plaintiffs’ Complaint Should be Dismissed Due to Improper Venue and Transferred to Bucks County, PA Pursuant to P.A.R.C.P. 1028(a)(1) and 1028(a)(4)

A plaintiff’s choice of forum is to be given weight, and the burden is on the party challenging the choice to show it was improper; however, a plaintiff’s choice of venue is not absolute or unassailable. If there exists any proper basis for the trial court’s decision to grant a petition to transfer venue, the decision must stand. Forrester v. Hanson, 901 A.2d 548, 552 (Pa. Super. 2006) (citation omitted). Pursuant to 1006(b), “[a]ctions against the following defendants, except as otherwise provided in subdivision (c), may be brought in and only in the counties

designated by the following rules: political subdivisions, Rule 2103; partnerships, Rule 2130; unincorporated associations, Rule 2156; corporations and similar entities, Rule 2179."

Pennsylvania Rule of Civil Procedure 2179 states that:

(a) Except as otherwise provided by an Act of Assembly, by Rule 1006(a.1) or by subdivision (b) of this rule, a personal action against a corporation or a similar entity may be brought in and only in:

- (1) the county where its registered office or principal place of business is located;
- (2) a county where it regularly conducts business;
- (3) the county where the cause of action arose;
- (4) a county where a transaction or occurrence took place out of which the cause of action arose, or
- (5) a county where the property or part of the property which is the subject matter of the action is located provided that equitable relief is sought with respect to the property.

Pa.R.C.P. 2179(a).

In the present matter, Pa.R.C.P. 2179(1)(3), (4) and (5) are inapplicable on the face of the Complaint insofar as this is a premises liability action and Plaintiffs allege that the alleged accident in question occurred at a store located in Bucks County, PA (Fairless Hills, PA). Pa.R.C.P. 2179(a)(1) also does not establish venue in Philadelphia County insofar as Plaintiff's allegation that Moving Defendant (Gabriel Brothers, Inc. and/or "GABE'S") has a "regular place of business" at 6720 Frankford Avenue, Philadelphia, PA is factually wrong and, in fact, Moving Defendant neither owned nor occupied any real estate located in Philadelphia County at any time relevant to this litigation. See Exhibit "B," Affidavit of Ryan Armstrong. Accordingly, it appears Plaintiffs are seeking to rely upon 2179(a)(2). Importantly, however, none of the Defendants "regularly conducted business" in Philadelphia during any relevant time period and thus Plaintiffs' reliance upon 2179(a)(2) is misplaced.

In order to be deemed as "regularly conducting business" in a particular county, a business entity must perform acts in a county of sufficient quality and quantity before venue will be established. See Zampana-Barry v. Donoghue, 921 A.2d 500, 503 (Pa. Super. 2007) *appeal denied*, 940 A.2d 366 (Pa 2007) (citing Purcell v. Bryn Mawr Hosp., 579 A.2d 1282 (Pa. 1990)). Quality of acts will be found if an entity performs acts in a county that directly further or are essential to the entity's business objective. Zampana-Barry, 921 A.2d at 503. Incidental acts, including advertising, solicitation of business, education programs, hiring personnel, and purchase of supplies, which "aid a main purpose are collateral" and not deemed necessary to an entity's existence. Id. at 503-04. Quantity of acts means those that are sufficiently continuous so as to be considered habitual. Id. at 504. Each case must be based upon its own individual facts. Id.

Courts of this Commonwealth have repeatedly held that for the purposes of venue by way of Pa.R.C.P. 2179(a)(2), the "defendant must have had physical presence in the county...." Levey v. Cogen Sklar L.L.P., 2002 Phila. Ct. Com. Pl. LEXIS 86, at *5 (Apr. 11, 2002) (citations omitted) (emphasis added); Gale v. Mercy Catholic Med. Ctr. Eastwick, Inc., 698 A.2d 647, 652 (Pa. Super. Ct. 1997); Canter v. Am. Honda Motor Corp., 231 A.2d 140, 143 (Pa. 1967). "[W]here the defendant never entered the county in furtherance of the corporate objective, the mere fact that the defendant conducted some of its business with county residents [is] not sufficient to confer venue." Feltoon v. Nolen, 2002 Phila. Ct. Com. Pl. LEXIS 60, at *10 (Nov. 1, 2002); Masel v. Glassman, 689 A.2d 314, 318-19 (Pa. Super. Ct. 1997) (holding that venue was improper in Philadelphia County when physician services company received 20% of gross revenues from Philadelphia third party payers and 3% from Philadelphia residents, but conducted no operations in Philadelphia).

In the present matter, Defendants did not regularly conduct(ed) business in Philadelphia County at any relevant time. Specifically, Gabriel Brothers, Inc. d/b/a GABE'S is a retailer whose business includes 113 retail stores. None of these stores are located within Philadelphia County. Gabriel Brothers, Inc. d/b/a GABE'S employees do not travel into Philadelphia County for business purposes. Gabriel Brothers, Inc. d/b/a GABE'S has no physical presence within Philadelphia County. Gabriel Brothers, Inc. d/b/a GABE'S, moreover, does not have a "regular place of business" at 6720 Frankford Avenue, Philadelphia PA 19135-2104 and this allegation in the Complaint is simply factually wrong and inaccurate. See e.g., Exhibit "B."

In accord with the foregoing, Plaintiff cannot establish venue in Philadelphia County pursuant to Pa.R.C.P. 2179(a)(1), (2), (3), (4) or (5). Moreover, it is respectfully suggested that it is clear that Bucks County is the appropriate State Court venue for this litigation as this is a premises liability action and the premises where Plaintiff Cesar Cucul claims he was injured is located in Buck County, PA. Accordingly, it is respectfully submitted that this case should be dismissed and transferred to the Bucks County Court of Common Pleas.

B. Plaintiffs' Allegations of Recklessness and Wantonness Should be Stricken with Prejudice Pursuant to Pa.R.C.P. 1028(a)(3) and (4)

In Paragraphs 20, 21, 23 and 30 of the Complaint, Plaintiff alleges Defendants engaged in "recklessness." See Exhibit "A" at ¶¶ 20, 21, 23 and 30. In Paragraphs 20, 21 and 23 of the Complaint, Plaintiff alleges Defendants engaged in "wantonness." See Exhibit "A" at ¶¶ 20, 21 and 23.

Pennsylvania courts define "recklessness" by reference to Section 500 of the Restatement (Second) of Torts which provides that:

The actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which

would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.

See Stubbs v. Frazer, 454 A.2d 119, 120 (Pa. Super. 1982) (quoting Restatement (Second) of Torts, § 500 (1965)).

Comment g of Section 500 of the Restatement (Second) of Torts compares reckless conduct to negligence as follows:

Reckless misconduct differs from negligence in several important particulars. It differs from that form of negligence which consists in mere inadvertence, incompetence, unskillfulness, or a failure to take precautions to enable the actor adequately to cope with a possible or probable future emergency, in that reckless misconduct requires a conscious choice of a course of action, either with knowledge of the serious danger to others involved in it or with knowledge of facts which would disclose this danger to any reasonable man . . .

Id.

Accordingly, an allegation of recklessness must demonstrate that “the actor has intentionally done an act of an unreasonable character, in disregard to a risk known to him or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow.” Evans v. Philadelphia Transp. Co., 212 A.2d 440, 443 (Pa. 1965) (citations omitted); see also Lewis v. Miller, 543 A.2d 590, 592 (Pa. Super. 1988).

Pennsylvania courts have opined that “[i]n order for conduct to be considered reckless, it must involve an easily perceptible danger of death or substantial physical harm, and the probability that it will so result must be substantially greater than is required for ordinary negligence . . .” Zazzera v. Roche, 54 Pa. D. & C.4th 225, 232, 2001 WL 1846971 (Lackawanna Cty. Ct. Com. Pl. Dec. 10, 2001) (quoting Hall v. Jackson, 788 A.2d 390, 403, ¶ 31 (Pa. Super. 2001) (emphasis added)).

To be considered reckless, the actor “must recognize that his conduct involves a risk substantially greater in amount than that which is necessary to make his conduct negligent.” Id. Therefore, in order to allege that a defendant acted “recklessly,” a plaintiff must allege facts showing that the defendant possessed this requisite mental state and acted consciously in a way that he knew created the substantial risk of harm to others. Gaul v. Consol. Rail Corp., 556 A.2d 892, 898 (Pa. Super. 1989).

Plaintiff fails to set forth specific facts to support any allegation that Green Lake had knowledge of acts or conduct that created a high risk of physical harm to Plaintiff, or that Green Lake consciously acted with disregard or indifference to an alleged serious danger to Plaintiff. See generally Stubbs v. Frazer, 454 A.2d 119, 120 (Pa. Super. 1982). Since no specific facts are alleged that establish that Defendants acted recklessly in any action or conduct it undertook, pursuant to Pa. R.C.P. 1028(a)(4), Plaintiff’s references to alleged “recklessness” in paragraph 20, 21, 23 and 30 of the Complaint must be stricken and dismissed. Allegations of wantonness, contained in paragraphs 20, 21 and 23 of the Complaint should likewise be stricken with prejudice pursuant to the rationale set forth above. Accordingly, in the absence of facts plead to support allegations of recklessness and wantonness, such allegations should be stricken from Plaintiffs’ Complaint pursuant to Pa.R.C.P. 1028(a)(3) and Pa.R.C.P. 1028(a)(4).

V. CONCLUSION

Based on the foregoing, Defendants respectfully request that this Honorable Court sustain these Preliminary Objections and enter the attached proposed Order or Alternate Order.

MARSHALL DENNEHEY WARNER
COLEMAN & GOGGIN

/s/ Nicholas D. Bowers

BY: _____

EDWARD J. TUTTE, ESQUIRE
NICHOLAS D. BOWERS, ESQUIRE
*Attorneys for Defendant, Gabriel Brothers,
Inc. d/b/a GABE'S*

Dated: 12/29/21

CERTIFICATE OF SERVICE

I, Nicholas D. Bowers , Esquire, hereby certify that on this date, I served the within Defendants' Preliminary Objections to Plaintiff's Complaint via e-filing notification, upon all counsel of record.

MARSHALL DENNEHEY WARNER
COLEMAN & GOGGIN

/s/ Nicholas D. Bowers

BY: _____
EDWARD J. TUTTE, ESQUIRE
NICHOLAS D. BOWERS, ESQUIRE
*Attorneys for Defendant, Gabriel Brothers,
Inc. d/b/a GABE'S*

Dated: 12/29/21

EXHIBIT “D”

CESAR CUCUL AND VERONICA CUCUL (H/W)	:	
	:	
Plaintiffs,	:	COURT OF COMMON PLEAS PHILADELPHIA COUNTY
	:	
vs.	:	NOVEMBER TERM, 2021
	:	
GABRIEL BROTHERS, INC.; and,	:	NO. 01069
	:	
GABE'S; and,	:	
	:	
JOHN DOES 1-10 (fictitious Property Owner);	:	
and,	:	
	:	
JOHN DOES 11-21 (fictitious Property	:	
manager)	:	
	:	
Defendants,	:	

AFFIDAVIT

I, Ryan N. Armstrong, Esq., hereby state that the following is true and correct to the best of my knowledge, information and belief; and I understand that the statements herein are made subject to the penalties of 18 Pa.C.S.A. §4904 relating to unsworn falsifications to authorities:

1. I am Corporate Counsel for Risk & Liability at Gabriel Brothers, Inc. d/b/a GABE'S.
2. The facts set forth in this Affidavit are known to me.
3. Gabriel Brothers, Inc. d/b/a GABE'S is a privately held retailer headquartered in Morgantown, West Virginia.
4. "GABE'S" is a fictitious name and d/b/a for the West Virginia business entity, Gabriel Brothers, Inc.
5. "GABE'S," a fictitious name, is not a business entity of any form nor a proper jural entity.

6. Gabriel Brothers, Inc. d/b/a GABE'S does not manufacture or build its own products.

7. Gabriel Brothers, Inc. d/b/a GABE'S principal place of business is located at 55 Scott Avenue, Morgantown, WV 26508.

8. Gabriel Brothers, Inc. d/b/a GABE'S has 120 retail store locations, branded as "GABE'S," none of which are located within Philadelphia, Pennsylvania.

9. Gabriel Brothers, Inc. d/b/a GABE'S did not own any real property located in Philadelphia, Pennsylvania during the five year time period preceding the date of this Affidavit through the present.

10. Gabriel Brothers, Inc. d/b/a GABE'S, a West Virginia Corporation and defendant herein, did not own nor occupy a place of business and/or other real estate located at 6720 Frankford Avenue, Philadelphia, PA 19135-2104 during the five year time period preceding the date of this Affidavit through the present.

11. Gabriel Brothers, Inc. d/b/a GABE'S has not rented, leased or otherwise occupied real property in Philadelphia, Pennsylvania during the five year time period preceding the date of this Affidavit through the present.

12. During the five year time period preceding the date of this Affidavit through the present, Gabriel Brothers, Inc. d/b/a GABE'S has not maintained a telephone number, drop box nor mailing address in Philadelphia County.

13. During the five year time period preceding the date of this Affidavit through the present, Gabriel Brothers, Inc. d/b/a GABE'S made no in-store sales in Philadelphia County.

14. During the five year time period preceding the date of this Affidavit through the present, employees of Gabriel Brothers, Inc. d/b/a GABE'S did not travel into Philadelphia

County for purposes of selling or providing products or services to customer(s) domiciled in Philadelphia County.

15. Gabriel Brothers, Inc. d/b/a GABE'S has not "regularly conducted business" in Philadelphia County during the five year time period preceding the date of this Affidavit through the present.

Date: 29 Dec 2021

Ryan N. Armstrong
RYAN N. ARMSTRONG, ESQ.

EXHIBIT “E”

Bowers, Nicholas D.

From: Bowers, Nicholas D.
Sent: Monday, December 27, 2021 2:28 PM
To: 'jrosenberg@stark-stark.com'
Cc: Tuite, Edward J.
Subject: Proposed Stip to Cap Damages - Cucul v. Gabriel Bros, et. al., Phila CCP 211101069, File No. 41187-00252
Attachments: Cucul - Stip to Cap Damages at \$75k (143232844_1).pdf

Dear Mr. Rosenberg:

Ed Tuite and I represent Gabriel Brothers, Inc. and "GABE's," in relation to the above-referenced matter.

It appears this is or may be a case which is subject to removal to Federal District Court.

I am curious as to whether it is your position that the amount in controversy is less than \$75,000. If so, I ask that you kindly sign and return the attached Stipulation to Cap Damages at \$75,000 within one week of today.

Should you wish to discuss the foregoing, please feel free to contact me at the phone number set forth below.

To the extent I do not hear from you, I will assume it is your clients' position that the amount in controversy in this action is in excess of \$75,000.

Best regards,

Nick



Nicholas D. Bowers

Attorney at Law

2000 Market Street, Suite 2300, Philadelphia, PA 19103

Direct: (215) 575-2742 | Main: (215) 575-2600 | Fax: (215) 575-0856

[bio](#) | [e-mail](#) | [website](#)

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CESAR CUCUL AND VERONICA CUCUL (H/W)	:	
	:	
	:	COURT OF COMMON PLEAS
Plaintiffs,	:	PHILADELPHIA COUNTY
	:	
vs.	:	NOVEMBER TERM, 2021
	:	
GABRIEL BROTHERS, INC.; and,	:	NO. 01069
GABE'S; and,	:	
JOHN DOES 1-10 (fictitious Property Owner);	:	
and,	:	
JOHN DOES 11-21 (fictitious Property	:	
manager)	:	
	:	
Defendants.	:	

STIPULATION

AND NOW, this day of , 2022, it is hereby agreed and stipulated to
by and between the undersigned on behalf of their respective clients that the damages in this
matter shall not exceed \$75,000.00.

STARK & STARK

MARSHALL DENNEHEY WARNER
COLEMAN & GOGGIN

JOEL R. ROSENBERG, ESQUIRE
Attorney For Plaintiff

EDWARD J. TUIE, ESQUIRE
NICHOLAS D. BOWERS, ESQUIRE
Attorney For Defendants, Gabriel Brothers,
Inc. and "GABE'S"

Dated: